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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARCHIE JOHN RUCKER, JR., Defendant and Appellant.	B220186 (Los Angeles County Super. Ct. No. TA098143)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Modified and, as so modified, affirmed.

Diana M. Teran and Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Archie John Rucker, Jr., appeals the judgment entered following his conviction by jury of first degree murder committed while he was engaged in the commission of attempted robbery in which a principal personally discharged a firearm causing death and attempted robbery in which Rucker personally used a firearm. (Pen. Code, §§ 187, 190.2, subd. (a)(17), 12022.53, subds. (d) & (b), 664/211.)

We reject Rucker's claim of instructional error and deny his request to amend the order for restitution. We order the judgment modified to delete a $20 DNA penalty assessment imposed under Government Code section 76104.7 and, as so modified, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The murder of Almira Herrera in the commission of attempted robbery*.

On December 17, 2007, Alan Herrera lived in a garage behind his parents' home on East 112th Street in Los Angeles. At approximately 9:00 p.m., he was playing video games in the garage with four friends including José Posada, Ernesto Herrerra and Christopher Meza. Alan Herrera went to the gate in front of the house where he was confronted by Warren Nelson who had a nine-millimeter handgun, and Rucker who had a shotgun. Nelson pointed the handgun at Alan Herrera's head and led Alan Herrera past the house and into the garage. Rucker followed them into the garage with the shotgun.

Nelson told Alan Herrera's friends to get on the floor and they complied. Ernesto Herrera testified Rucker pointed a shotgun at his face and, while he was on the floor, someone began tying him with duct tape. Nelson repeatedly demanded to know where the money was.

José Herrera, Alan's father, heard noises in the back yard and asked his wife to "see what's going on." Alan Herrera heard his mother scream, "What's going on out there?" The intruders panicked and said, "get the mom." Nelson directed Alan Herrera into the backyard with the gun still at his head. Rucker followed with the shotgun.

José Herrera testified that when his wife returned from the backyard, Rucker was pointing a shotgun at her. Also, Nelson repeatedly struck his son on the head with a gun and demanded to know where the money was. José Herrera hit Rucker with a chair in the chest causing Rucker to fall. Rucker got up, "cranked" the shotgun and fired it into the air. He then "cranked" it again and pointed it at José Herrera.

Alan Herrera saw his father trying to push Rucker and Rucker trying to hit his father with the shotgun in the head. When Alan Herrera intervened and pushed Rucker, Rucker hit Alan twice in the head with the shotgun. Nelson tried to enter the home but Almira Herrera, Alan's sister, stopped him. Almira Herrera then chased Nelson into the backyard and tried to stab Nelson with a knife. Alan Herrera heard a gunshot and immediately thereafter his sister fell to the ground. The intruders then fled.

Almira Herrera died of a gunshot wound to the chest.

Alan Herrera and Christopher Meza testified Nelson and Rucker were accompanied by two unarmed individuals. The police found a nine-millimeter casing in the backyard but no spent shotgun shell.

2. *Rucker's audiotape recorded statement*.

Los Angeles Police Detective Roger Allen interviewed Rucker regarding this incident. An audiotape recording of the interview was played for the jury.

After waiving his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694], Rucker said Nelson approached him at 109th Street and Watts Avenue and talked about a robbery, which Nelson referred to as a "smooth little lick." Nelson said he, Rucker and a "smoker dude" were going to commit the robbery and Rucker would be the look out. Nelson told Rucker to meet him at 112th Street. When Rucker arrived, Nelson gave Rucker a shotgun that was loaded with five rounds. Nelson had a nine-millimeter handgun. Nelson, the smoker dude and Rucker went to the gate. The smoker dude telephoned Alan Herrera and, when Alan Herrera opened the gate, Nelson grabbed him and took him to the back.

Rucker initially claimed he stayed at the gate with the shotgun. When Detective Allen said Rucker's DNA had been found on the duct tape, Rucker admitted he opened the tape, bit it and "wrapped it around . . . [s]o it wouldn't stick back together." Rucker then further admitted he went into the back yard with Nelson. Rucker ordered everyone to freeze, then stood by the side of the house and watched Nelson who had a gun at Alan Herrera's neck. Rucker saw a female with a knife, yelling and chasing Nelson. An older male rushed Rucker with a chair and struck him, causing him to fall. Rucker heard Nelson threaten to shoot the female, followed by a gunshot. At that point, Rucker ran from the scene. Rucker denied he intentionally hurt anyone and expressed surprise at the number of people at the location.

3. *Sentencing*.

After the trial court sentenced Rucker to life in prison without the possibility of parole, it addressed victim restitution and asked whether the amount requested was related to funeral expenses and whether there was any objection to imposition of restitution. The prosecutor indicated he believed the amount did relate to funeral expenses and defense counsel stated, "Yes. Yes." The trial court ordered Rucker to pay victim restitution in the amount of $7,487.25. The trial court imposed a $200 restitution fine (Pen. Code, §1202.4, subd. (b)), a $60 court security assessment (Pen. Code, § 1465.8, subd. (a)(1)), a $30 criminal conviction assessment (Gov. Code, § 70373), and a $20 DNA penalty assessment pursuant to Government Code section 76104.7.

CONTENTIONS

Rucker contends the trial court committed instructional error, the order for victim restitution must be modified to provide for joint and several liability with Nelson and the trial court erroneously imposed a DNA penalty assessment under Government Code section 76104.7.

DISCUSSION

1. *Rucker's claim of instructional error fails*.

In order to prove a special circumstance allegation against a defendant who did not intend to kill and was not the actual killer, the prosecution must demonstrate that (1) the defendant was a major participant in the underlying felony and (2) the defendant acted with reckless indifference to human life. (*People v. Estrada* (1995) 11 Cal.4th 568, 575; Pen. Code, § 190.2, subd. (d).)

Rucker concedes he was a major participant in the attempted robbery. However, with respect to whether Rucker acted with reckless indifference to human life, Rucker notes the prosecutor relied exclusively on circumstantial evidence, namely, carrying a loaded shotgun, attempting a robbery with three other individuals and hitting Alan Herrera in the head with the shotgun.

Rucker argues the evidence could also be interpreted so as to conclude Rucker did not act with reckless indifference to human life. Rucker notes he did not fire the shotgun after he was struck in the chest with a chair, thereby suggesting he did not act with reckless indifference to human life. Further, even if he did fire the shotgun into the air as José Herrera testified, the jury could interpret that as a warning shot fired to prevent anyone from being injured. Rucker claims the issue was contested by defense counsel who argued Rucker did not intend to harm anyone. Rucker also notes that, in the statement to Detective Allen, Rucker said he believed it would be a quick "in-and-out" robbery, he was shocked by the number of people at the Herrera home, he did not try to hurt anyone, and he was trying to leave when he was struck by the chair.

Based on the foregoing, Rucker contends the trial court had a sua sponte obligation to give CALCRIM No. 225, the circumstantial evidence instruction relating to intent or mental state, or CALCRIM 705 regarding proof of specific intent required for a special circumstance allegation by circumstantial evidence. Rucker claims the error was prejudicial because, at a separate trial, Nelson's jury was instructed with both CALCRIM 225 and 705 and, on evidence similar to the evidence presented against Rucker, found Nelson not guilty of special circumstance first degree felony murder. Rucker suggests

the failure to give these instructions on how to evaluate circumstantial evidence caused the inconsistent verdict returned by Rucker's jury.

Rucker concludes that, had the jury been given CALCRIM No. 225 or 705, it is reasonably probable the jury might have reached a more favorable result on the special circumstance allegation. Rucker requests reversal of the special circumstance allegation.

We do not find Rucker's argument persuasive.

The trial court gave CALCRIM No. 224, the general circumstantial evidence instruction regarding sufficiency of evidence, and CALCRIM No. 704 regarding how to evaluate circumstantial evidence in the context of the special circumstance allegation.[1] The trial court also gave CALCRIM No. 703 regarding the mental state required for the special circumstance allegation. These instructions substantially covered how the jury should approach the evaluation of circumstantial evidence in the context of the special

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[1] CALCRIM No. 224 provides: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

CALCRIM No. 704 provides: "Before you may rely on circumstantial evidence to conclude that a special circumstance allegation is true, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find that a special circumstance allegation is true, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the special circumstance allegation is true. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the special circumstance allegation is true and another reasonable conclusion supports a finding that it is not true, you must conclude that the allegation was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

circumstance allegation. *People v. Hines* (1997) 15 Cal.4th 997, specifically found no reversible error in the failure to give CALJIC Nos. 8.83 and 8.83.1 (the predecessors of CALCRIM Nos. 704 and 705), where the trial court gave CALJIC No. 2.01 (the predecessor of CALCRIM No. 224) which instructed the jury on how to evaluate circumstantial evidence generally. (*People v. Hines, supra,* at p. 1051; accord, *People v. Lewis* (2001) 25 Cal.4th 610, 653-654; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.)[2]

Based on this authority, we conclude the instructions given by the trial court adequately addressed how the jury should approach the use of circumstantial evidence in the context of the special circumstance allegation. Regarding Rucker's reliance on the result in Nelson's trial to demonstrate prejudice, it is settled that an inconsistent verdict reached by a jury trying a codefendant is an insufficient ground on which to reverse a conviction. (*People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 5.)

In the reply brief, Rucker contends *Lewis* is distinguishable because, in that case, the trial court gave CALJIC No. 2.02 (the predecessor of CALCRIM No. 225) and CALJIC No. 8.83 (the predecessor of CALCRIM No. 704). (*People v. Lewis, supra,* 25 Cal.4th at p. 653.) On appeal, the defendant claimed the trial court should have given the more specific CALJIC No. 8.83.1 (the predecessor of CALCRIM No. 705), instead of CALJIC No. 8.83. *Lewis* rejected this argument and found the trial court, having instructed on the use of circumstantial evidence to prove specific intent generally, was not required to provide a repetitive instruction informing the jury how to evaluate circumstantial evidence of specific intent as it related to the special circumstance allegations. (*People v. Lewis*, at pp. 653-654.)

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[2] Cases addressing CALJIC instructions are instructive when discussing the analogous CALCRIM instructions. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1171, fn. 12.)

Rucker complains that, because the trial court did not give CALCRIM Nos. 225 or 705 and did not otherwise instruct the jury how to evaluate circumstantial evidence of specific intent or mental state, Rucker was deprived of the benefit of the circumstantial evidence rule as it pertains to proof of mental state.

We do not find this distinction determinative. We note that *People v. Hines*, *supra,* 15 Cal.4th 997, specifically found no reversible error in the failure to give CALJIC Nos. 8.83 and 8.83.1 (the predecessors of CALCRIM Nos. 704 and 705), where the trial court gave CALJIC No. 2.01 (the predecessor of CALCRIM No. 224) which instructed the jury how to evaluate circumstantial evidence generally. (*People v. Hines*, at p. 1051.) In *Hines*, the trial court also gave CALJIC No. 2.02 (CALCRIM No. 225) on how to evaluate circumstantial evidence as it relates to mental state. However, CALJIC No. 2.02 was not relied upon to reject the claim the trial court should have given CALJIC Nos. 8.83 and 8.83.1. *Hines* held those instructions duplicated CALJIC No. 2.01 (CALCRIM No. 224). Because the trial court gave CALCRIM No. 224, we conclude the failure to give CALCRIM Nos. 225 or 705 does not constitute error.

In any event, any conceivable error was harmless under any standard of review. To suggest on these facts that Rucker's conduct did not demonstrate reckless indifference to human life strains credulity. Rucker participated in an attempt to commit a residential robbery armed with a loaded shotgun. His companion had a loaded handgun. Rucker had duct tape which he had opened and prepared for use. Rucker was seen brandishing the shotgun, pointing the shotgun at Alan Herrera's friends and members of the Herrera family, he struck Alan Herrera with the shotgun in front of his family while Nelson also was striking him with the handgun and, according to José Herrera, Rucker "cranked" the shotgun, fired once and cranked it again. Certainly these actions reflect reckless disregard for human life.

We therefore reject Rucker's claim of instructional error on the facts presented.

2. *The restitution order need not be modified*.

The trial court ordered Rucker to pay restitution to the Victim Compensation and Government Claims Board in the amount of $7,487.25.

On appeal, Rucker claims the trial court should have ordered the restitution obligation to be joint and several with codefendant Nelson in order to avoid double recovery by the victim. Rucker primarily relies upon *People v. Blackburn* (1999) 72 Cal.App.4th 1520. In that case, the trial court ordered each defendant to pay the full amount of the restitution. On appeal, *Blackburn* found it obvious the trial court intended the liability to be joint and several to avoid double recovery and to insure that each defendant was entitled to credit for any actual payment made by the other. *Blackburn* modified the judgment "to provide expressly that the direct victim restitution ordered is joint and several." (*Id.* at p. 1535.) Based on this authority, Rucker requests modification of the restitution order to reflect joint and several liability with Nelson.

We decline to modify the order for restitution. *Blackburn* is distinguishable in that both defendants were before the trial court at the time of sentencing. Here, Nelson was not tried with Rucker and it appears Nelson had not yet been convicted at the time the trial court sentenced Rucker. Thus, an order imposing restitution upon Nelson would have violated Nelson's right to a hearing on the determination of the amount of restitution. (Pen. Code, § 1202.4, subd. (f)(1).)

Moreover, although a trial court has authority to order codefendants jointly and severally liable for direct victim restitution (see *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049-1052; *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1098-1100; *People v. Campbell* (1994) 21 Cal.App.4th 825, 833-834; *People v. Zito* (1992) 8 Cal.App.4th 736, 744-746), there is no requirement that restitution be imposed jointly.

Finally, Rucker retains the ability to seek modification of the order in the trial court. Pursuant to Penal Code section 1202.4, subdivision (f)(1), "The court may modify the [restitution order], on its own motion or on the motion of the district attorney, the victim or victims, or the defendant." Thus, Penal Code section 1202.4 allows the trial court to rectify any prejudice to Rucker.

Based on the foregoing, we decline to modify the order for restitution.

3. *The DNA penalty assessment imposed pursuant to Government Code section 76104.7 must be stricken.*

In addition to the order for victim restitution, the trial court imposed a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a $60 court security assessment (Pen. Code, § 1465.8, subd. (a)(1)), a $30 criminal conviction assessment (Gov. Code, § 70373) and a $20 DNA penalty assessment (Gov. Code, § 76104.7).

Rucker contends the DNA penalty assessment imposed pursuant to Government Code section 76104.7 must be vacated.

It appears he is correct. The DNA state-only penalty assessment under Government Code section 76104.7, subdivision (a), can only be imposed *in addition to* an assessment under Government Code section 76104.6. Here, the trial court did not impose a DNA penalty assessment pursuant to Government Code section 76104.6, subdivision (a)(1). Therefore, an assessment under Government Code section 76104.7 cannot be imposed.

Additionally, Government Code section 76104.7 provides for assessments to be levied upon other fines, penalties, or forfeitures. Here, there was no fine, penalty, or forfeiture imposed which could have supported a DNA penalty assessment under Government Code section 76104.7. The "state only penalty" does not apply to restitution fines. (Gov. Code, § 76104.7, subd. (c)(1).) Further, the $60 court security assessment (Pen. Code, §1465.8, subd. (a)(1)) and the $30 criminal conviction assessment (Gov. Code, § 70373) are statutorily excluded as bases for the DNA penalty assessment. (Pen. Code, § 1465.8, subd. (b); Gov. Code, § 70373, subd. (b); *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396.)

Therefore, the $20 DNA penalty assessment imposed under Government Code section 76104.7 must be stricken. We shall order the abstract of judgment modified accordingly.

DISPOSITION

The judgment is ordered modified to delete the $20 DNA penalty assessment imposed under Government Code section 76104.7 and, as so modified, affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.